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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 STEPHANIE CLIFFORD a.k.a.
13 STORMY DANIELS a.k.a. PEGGY
14 PETERSON, an individual,

15 Plaintiff,

16 v.

17 DONALD J. TRUMP a.k.a. DAVID
18 DENNISON, an individual,
19 ESSENTIAL CONSULTANTS, LLC, a
20 Delaware Limited Liability Company,
21 MICHAEL COHEN, an individual, and
22 DOES 1 through 10, inclusive,

23 Defendants.

Case No. 2:18-CV-02217-SJO-FFM

**DEFENDANT ESSENTIAL
CONSULTANTS LLC AND
MICHAEL COHEN'S
OPPOSITION TO
PLAINTIFF'S MOTION
FOR LEAVE TO AMEND
TO FILE SECOND
AMENDED COMPLAINT**

[Declaration of Brent H. Blakely Filed
Concurrently Herewith]

Assigned to the Hon. S. James Otero
Action Filed: March 6, 2018

Date: December 3, 2018

Time: 10:00 a.m.

Location: 350 West 1st Street
Courtroom 10C, 10th Floor
Los Angeles, CA 90012

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND	2
III.	ARGUMENT	4
A.	Plaintiff’s Motion to Amend Was Filed in Violation of the Local Rules and this Court’s Orders	4
B.	Plaintiff’s Undue Delay and Bad Faith, along With the Prejudice to Mr. Cohen, Warrant the Denial of Plaintiff’s Motion to Amend	4
C.	Even If This Court Allows Plaintiff to Dismiss Her Defamation Claim Against Cohen, It Should Exercise its Discretion to Award Mr. Cohen His Fees Pursuant to Civil Code Section 425.16(c)	9
D.	This Court Should Place Conditions on Any Amendment	12
E.	This Court Should Exercise its Inherent Powers and Sanction Plaintiff’s Counsel Pursuant to FRCP Rule 11	13
IV.	CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>Ascon Properties, Inc. v. Mobil Oil Co.</i> , 866 F.2d 1149 (9th Cir. 1989).....	5
<i>Carvalho v. Equifax Info. Servs., LLC</i> , 629 F.3d 876 (9th Cir. 2010).....	5
<i>Chambers v. NASCO, Inc.</i> 501 U.S. 32 (1991)	13, 14
<i>Coltrain v. Shewalter</i> (1998) 66 Cal. App. 4 th 94.....	9, 10
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384, 392-393.....	8
<i>Eminence Capital, LLC v. Aspeon, Inc.</i> , 316 F.3d 1048 (9th Cir. 2003).....	5
<i>Firchau v. Diamond Nat'l Corp.</i> , 345 F.2d 269 (9th Cir. 1965).....	13
<i>Fleming v. Coverstone</i> , 2009 U.S. Dist. LEXIS 22083 (N.D. Cal. March 18, 2009).....	9
<i>Foman v. Davis</i> , 371 U.S. 178 (1962)	5
<i>General Signal Corp. v. MCI Telecommunications Corp.</i> , 66 F.3d 1500 (9 th Cir. 1995).....	13
<i>Gertz v. Robert Welch, Inc.</i> 418 U.S. 323 (1974)	7
<i>Ghazali v. Moran</i> , 46 Fed. 3d 52 (9 th Cir. 1995)	12
<i>Golden Eagle Distributing Corp. v. Burroughs Corp.</i> , 801 F. 2d 1531 (9th Cir. 1986).....	8
<i>Gottesman v. Santana</i> , 263 F. Supp. 3d 1034 (N.D. Cal. 2017)	9, 10, 11, 12
<i>Itel Secur. Litig.</i> , 791 F. 2d 672 (9 th Cir. 1986).....	14
<i>Jackson v. Bank of Hawaii</i> , 902 F.2d 1385 (9th Cir. 1990).....	8
<i>Ketchum v. Moses</i> (2001) 24 Cal. 4 th 1122.....	12

1	<i>Liu v. Moore</i>	
2	(1999) 69 Cal. App. 4 th 745	12
3	<i>McGarry v. University of San Diego</i>	
4	(2007) 154 Cal.App.4th 97.....	7
5	<i>Mireskandari v. Associated Newspapers, Ltd.,</i>	
6	665 F. App'x 570 (9th Cir. 2016)	10
7	<i>Mireskandari v. Mail,</i>	
8	2014 U.S. Dist. LEXIS 199028 (C.D. Cal. Aug. 4, 2014).....	10
9	<i>Nguyen-Lam v. Cao</i>	
10	(2009) 171 Cal. App. 4 th 858.....	5
11	<i>Paris Hilton v. Hallmark Cards et al.,</i>	
12	580 F.3d 874 (9th Cir. 2009).....	6
13	<i>Reyes v. Wells Fargo Bank, N.A.,</i>	
14	2017 U.S. Dist. LEXIS 198129 (CD Cal. Aug. 7, 2017).....	12
15	<i>Roadway Express, Inc. v. Piper,</i>	
16	447 U.S. 752 (1980)	13
17	<i>Rogers v. Home Shopping Network, Inc.,</i>	
18	57 F. Supp. 2d 973 (C.D. Cal. 1999).....	5
19	<i>Roth v. First in Awareness, LLC,</i>	
20	2011 U.S. Dist. LEXIS 103053 (N.D. Cal. Sept. 13, 2011)	13
21	<i>Swanson v. United States Forest Serv.,</i>	
22	87 F.3d 339 (9th Cir. 1996).....	5
23	<i>Uecker v. A Very Nice Pool Co. (In re Mortgage Fund '08 LLC),</i>	
24	2015 U.S. Dist. LEXIS 129548 (C.D. Cal. Sept. 2015).....	13
25	<i>Verizon Delaware, Inc. v. Covad Commc'ns Co.,</i>	
26	377 F. 3d 1081 (9 th Cir. 2004).....	5
27	<i>Washer v. Bank of America</i>	
28	(1948) 87 Cal. App. 2d. 501	6, 7
	<i>Wilbanks v. Wolk</i>	
	(2004) 121 Cal.App.4th 883.....	6
	<u>Rules</u>	
	Fed. R. Civ. P. 15(a)(1).....	4
	Fed. R. Civ. P. 15(a)(2).....	5
	FRCP 11(b)(1)	14
	FRCP 11(b)(2)	14
	FRCP 15(a)(1)(B)	5

1 **I. INTRODUCTION**

2 On March 26, 2018 Plaintiff amended her complaint to add a defamation claim
 3 against Mr. Cohen targeting his truthful opinion contained in a press release that
 4 “[j]ust because something isn’t true doesn’t mean that it can’t cause you harm or
 5 damage.” Because this claim arose from acts in furtherance of Mr. Cohen’s right of
 6 free speech, on April 9, 2018 Mr. Cohen filed an Anti-SLAPP Motion pursuant to
 7 California Code of Civil Procedure Section 425.16. (hereinafter “Civil Code
 8 §425.16”) While Plaintiff has failed to articulate the reason why she now seeks (after
 9 seven months) to drop her defamation claim, there is only one logical conclusion –
 10 Plaintiff just lost a similar motion brought by Donald Trump and now seeks to escape
 11 the same result in connection her claim against Mr. Cohen. Not only is there no merit
 12 for Plaintiff’s Motion to Amend, it makes no difference to the outcome Plaintiff seeks
 13 to avoid. In fact, it makes it worse.

14 In Federal Court, when a plaintiff amends the pleadings to remove a
 15 defamation claim while an Anti-SLAPP motion is pending, it will be construed as a
 16 voluntary dismissal. Notwithstanding such a dismissal, Federal Courts retain
 17 jurisdiction over the motion to determine whether the defendant is a “prevailing
 18 defendant” under the Anti-SLAPP statute for purposes of attorneys’ fees and costs.
 19 Finally, a plaintiff’s voluntary dismissal raises the presumption that the defendant is
 20 the prevailing party.

21 Rather than allowing Plaintiff to evade responsibility for the meritless claim
 22 she filed against Mr. Cohen, by filing this Motion to Amend Plaintiff’s counsel has
 23 shot himself in the foot. If this Court denies Plaintiff’s Motion to Amend, Mr. Cohen
 24 should prevail on his unopposed Anti-SLAPP motion, and be awarded his fees in
 25 connection therewith. If Plaintiff gets what she seeks, the dismissal of her
 26 defamation claim thru an amended complaint, Mr. Cohen will still be deemed the
 27 prevailing party for the purpose of attorneys’ fees and costs.
 28

1 **II. FACTUAL BACKGROUND**

2 Plaintiff Stephanie Clifford is an adult-film actress and exotic dancer. Ms.
3 Clifford alleges that she had “an intimate relationship with Mr. Trump” in 2006-2007.
4 (ECF No. 14, First Amended Complaint (“FAC”), ¶ 10) In October 2016, according
5 to an exclusive news report, Ms. Clifford unsuccessfully attempted to sell a story
6 about an alleged one-night-stand with Mr. Trump to tabloid magazines and related
7 outlets for \$200,000. (ECF No. 31-1, Blakely Decl., ¶ 4, Ex. D, 3/29/18 Daily Mail
8 Article.)

9 Instead, Plaintiff admittedly signed a written Settlement Agreement and Mutual
10 Release dated October 28, 2016. (ECF No. 14, FAC ¶¶ 17-23 and Exs. 1-2; ECF No.
11 31-2; Cohen Decl., ¶¶ 2-3.) In the Settlement Agreement, Ms. Clifford promised to
12 arbitrate any dispute that might later arise between her and Mr. Trump. (ECF No. 14;
13 FAC Ex. 1 [p. 10].) Plaintiff also promised not to publicly disclose any Confidential
14 Information (as defined in the Settlement Agreement), including any of Mr. Trump’s
15 “alleged sexual partners, alleged sexual actions or alleged sexual conduct.” (Id. pp. 4-
16 8.)

17 As consideration for Ms. Clifford’s promises to arbitrate and to maintain
18 confidentiality, EC paid and Ms. Clifford admittedly accepted, the sum of \$130,000.
19 (*See* ECF No. 14; FAC ¶ 24 and Ex. 1 [p. 4, ¶23]) For the next sixteen months, Ms.
20 Clifford did not reject the Settlement Agreement or make any attempt to return the
21 \$130,000 that she was paid by EC. (ECF No. 31-2; Cohen Decl., ¶¶ 2-3.)

22 On or about February 22, 2018, EC filed an arbitration proceeding with ADR
23 Services, Inc. (“ADRS”) in Los Angeles (the “Arbitration”), pursuant to the
24 arbitration provision in the Settlement Agreement. (ECF No. 31-2; Cohen Decl., ¶ 8)
25 Upon EC’s emergency application for a Temporary Restraining Order, the arbitrator
26 (a retired California Superior Court judge) issued an order prohibiting Clifford from
27 violating the Settlement Agreement by, among other things, disclosing any
28 Confidential Information to the media or in court filings. (Id. at ¶ 9)

1 In response, Plaintiff filed a Complaint in the Superior Court of the State of
2 California for the County of Los Angeles on March 6, 2018, seeking a declaratory
3 judgment that the Agreement is void, invalid, or unenforceable. (See ECF No. 1-1;
4 *generally*, Notice of Removal, Ex. 1)

5 On March 26, 2018, pursuant to FRCP 15(a)(1)(A), Plaintiff filed the FAC
6 adding several new purported defenses to the arbitration provision and the Second
7 Claim for Defamation against Mr. Cohen. (ECF No. 14) Plaintiff's FAC asserts two
8 causes of action: (1) a claim for declaratory relief to invalidate the Settlement
9 Agreement, dated October 28, 2016, by and between EC and Plaintiff; and (2) a claim
10 for defamation against Mr. Cohen.

11 On March 27, 2018 Mr. Cohen's counsel sent Plaintiff's counsel a detailed
12 meet and confer letter setting forth the basis for Mr. Cohen's Anti-SLAPP Motion and
13 requesting that Plaintiff voluntarily dismiss her defamation claim. (ECF No. 31-1,
14 Ex. H)

15 On April 2, 2018 the parties held a meet and confer discussion regarding Mr.
16 Cohen's anticipated Anti-SLAPP motion. (ECF No. 31-1, pg. 3) During this
17 discussion Mr. Cohen's counsel explained in detail why Plaintiff's defamation claim
18 was subject to California's Anti-SLAPP statute, and urged Plaintiff's counsel to
19 dismiss same, which they refused to do. (Id)

20 On April 9, 2018 Mr. Cohen filed his Anti-SLAPP Motion. (ECF No. 31) That
21 same day the FBI raided Mr. Cohen's residence and office. (ECF No. 50)

22 Since March of 2018 Plaintiff and her attorney have used this litigation as a
23 platform to malign others to advance their own selfish interests. Mr. Cohen, who was
24 largely unable to defend himself due to the criminal investigation, has been the
25 primary target of Plaintiff's counsel. As described in detail in Mr. Cohen's Motion
26 for a Restraining Order (ECF No. 60), Plaintiff's counsel maligned Mr. Cohen in
27 hundreds of television appearances and tweets, which have been heard by millions of
28 listeners, heedless of the impact that this would have on Mr. Cohen and his family.

On September 24, 2018 the Parties stipulated to hearing dates on Defendants' Motions to Dismiss for Subject Matter Jurisdiction and Mr. Cohen's Anti-SLAPP Motion, and this Court issued an Order in connection with same. (ECF No. 83) On October 15, 2018 this Court granted Donald Trump's Motion to Strike in *Clifford v. Trump*, USDC Cent. Dist. California, case no. 18-06893. (Blakely Decl. Exh. #1; ECF No. 96, Exh. A) On November 5, 2018, seven (7) months after Mr. Cohen's counsel urged Plaintiff's counsel to dismiss the defamation claim and was forced to file an Anti-SLAPP motion, Plaintiff has now filed this present Motion to Amend which seeks to dismiss her defamation claim. (ECF No. 91)

III. ARGUMENT

A. Plaintiff's Motion to Amend Was Filed in Violation of the Local Rules and this Court's Orders

As discussed in Mr. Cohen's Objection (ECF No. 92), Plaintiff's counsel did not follow Local Rule 7-3 and this Court's Orders when they filed Plaintiff's Motion to Amend. (ECF No. 91).

B. Plaintiff's Undue Delay and Bad Faith, along With the Prejudice to Mr. Cohen, Warrant the Denial of Plaintiff's Motion to Amend

Motions to amend are governed by Rule 15(a) of the Federal Rules of Civil Procedure. A party may amend their pleading once as a matter of course within twenty-one days of service, or, if the pleading is one which a responsive pleading is required, twenty-one days after service of a responsive pleading or twenty-one days after service of a motion under 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). After that period, the decision to grant or deny leave to amend lies within the discretion of the court or the opposing party. See *Swanson v. United States Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). Rule 15(a) provides the Court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2).

Nonetheless, a court "may exercise its discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on part of the movant, repeated failure to

1 cure deficiencies by amendments previously allowed, undue prejudice to the
 2 opposing party . . . , [and] futility of amendment." *Carvalho v. Equifax Info. Servs.,*
 3 *LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (quoting *Foman v. Davis*, 371 U.S. 178,
 4 182 (1962)) Prejudice to the opposing party carries the greatest weight. *Eminence*
 5 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). "The district
 6 court's discretion to deny leave to amend is particularly broad where plaintiff has
 7 previously amended the complaint." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866
 8 F.2d 1149, 1152 (9th Cir. 1989).

9 *Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F. 3d 1081 (9th Cir. 2004)
 10 stands for the general proposition that federal courts sitting in diversity are bound by
 11 federal, not state, pleading standards where an Anti-SLAPP motion challenges the
 12 legal sufficiency of a complaint.¹ *See also Rogers v. Home Shopping Network, Inc.*,
 13 57 F. Supp. 2d 973, 982-983 (C.D. Cal. 1999). Nothing in *Verizon* requires courts to
 14 automatically grant a motion to amend. Rather, as with any other motion to amend,
 15 courts retain their discretion under FRCP 15(a)(1)(B) to grant or deny same.

16 Plaintiff amended her complaint on March 26, 2018 to add a claim for
 17 defamation against Mr. Cohen. (ECF No. 14) Shortly thereafter, the parties
 18 respective counsel engaged in detailed meet and confer discussions in an attempt to
 19 avoid unnecessary law and motion. In fact, on March 27, 2018 Mr. Cohen's counsel
 20 sent the following letter to Mr. Avenatti:

21 *I am writing to request an in-person meet and confer conference pursuant to*
 22

23
 24 ¹ In *Verizon* the District Court granted defendant's motion to dismiss Verizon's
 25 initial complaint and deferred ruling on defendant's Anti-SLAPP motion pending
 26 Verizon's amendment of the pleading. The district court observed that it was unclear,
 27 based on the current record, whether Verizon's claims were in fact based upon acts in
 28 furtherance of the defendant's rights of free speech and petition. Accordingly, the
 district court granted leave to amend in order to resolve the ambiguities as to the basis
 for its claim. *See Nguyen-Lam v. Cao* (2009) 171 Cal. App. 4th 858 (order granting
 leave to amend to show probability of prevailing on merits). (Blakely Decl. Ex. #3)

1 *Local Rule 7-3 regarding the First Amended Complaint you recently filed.*
 2 *Defendant Michael Cohen is considering filing an anti-SLAPP motion pursuant*
 3 *to California Code of Civil Procedure §425.16 in connection to Clifford's*
 4 *Second Cause of Action for Defamation. Under the statute, "[a] cause of*
 5 *action against a person arising from any act of that person in furtherance of*
 6 *the person's right of petition or free speech under the United States or*
 7 *California Constitution in connection with a public issue shall be subject to a*
 8 *special motion to strike, unless the court determines that the plaintiff has*
 9 *established that there is a probability that the plaintiff will prevail on the*
 10 *claim."*

11 *Here, Cohen's alleged statement arose in connection with a public issue. See*
 12 *e.g., Paris Hilton v. Hallmark Cards et al., 580 F.3d 874 (9th Cir. 2009). Ms.*
 13 *Clifford will have the burden of establishing that there is a probability of her*
 14 *prevailing on her defamation claim.*

15 *As set forth in the First Amended Complaint, Clifford's defamation claim is*
 16 *premised on the following statement by Mr. Cohen:*

17 *"Just because something isn't true doesn't mean that it can't cause you*
 18 *harm or damage. I will always protect Mr. Trump."*

19 *"Defamation consists of, among other things, a false and unprivileged*
 20 *publication, which has a tendency to injure a party in its occupation."*
 21 *Wilbanks v. Wolk (2004) 121 Cal.App.4th 883, 901. Washer v. Bank of*
 22 *America (1948) 87 Cal. App. 2d. 501, 509. The sine qua non of recovery for*
 23 *defamation ... is the existence of falsehood.' Because the statement must*
 24 *contain a provable falsehood, courts distinguish between statements of fact and*
 25 *statements of opinion for purposes of defamation liability. Although statements*
 26 *of fact may be actionable as libel, statements of opinion are constitutionally*
 27 *protected." McGarry v. University of San Diego (2007) 154 Cal.App.4th 97,*
 28 *112.*

Truth is an absolute defense to defamation. Washer v. Bank of America (1948)
87 Cal. App. 2d. 501, 509. Nothing about the aforementioned statement, which
is not directed at anyone in particular, is untrue. Indeed, as of this date, Ms.

1 Clifford had stated on at least three different occasions, including in a letter
2 that she signed one month before Mr. Cohen's alleged statement, that she did
3 **not** have an intimate relationship with Mr. Trump. Thus, her statements which
4 are completely contradictory—that she did **not**, and that she did, have an
5 intimate relationship—cannot both be true.

6 Ms. Clifford's defamation claim also will fail because when Mr. Cohen made
7 the alleged statement, he was engaging in his constitutionally protected right to
8 express his opinion. "Under the First Amendment there is no such thing as a
9 false idea. However pernicious an opinion may seem, we depend for its
10 correction not on the conscience of judges and juries but on the competition of
11 other ideas." *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 339-340 (1974).

12 Finally, Ms. Clifford will be required to establish a *prima facie* claim that she
13 suffered actual damages. Because the purported libelous statement would
14 require further consideration of extrinsic facts, it is not libel *per se*. Cal. Civil
15 Code §45a. Thus, Ms. Clifford would have to prove that she suffered special
16 damages as a proximate result thereof. Again, as of the time Mr. Cohen made
17 this statement, Ms. Daniels had stated on at least three different occasions that
18 she did **not** have an intimate relationship with Mr. Trump. Even if one were to
19 distort Mr. Cohen's statement to the length that you attempt in the First
20 Amended Complaint, it can hardly be said that Mr. Cohen's statement, which
21 nowhere contradicts Ms. Clifford's stated position at this time, somehow
22 damaged Ms. Clifford.

23 Should Ms. Clifford's defamation claim fail to survive an anti-SLAPP
24 challenge, she would be held responsible for Mr. Cohen's legal fees.

25 Moreover, you have exposed yourself personally to potential sanctions for
26 filing a frivolous pleading in violation of Federal Rule of Civil Procedure, Rule
27 11, which was enacted to deter abusive pretrial tactics and to streamline
28 litigation by excluding baseless filings. *Cooter & Gell v. Hartmarx Corp.*, 496
U.S. 384, 392-393; *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801
F. 2d 1531, 1542 (9th Cir. 1986).

We therefore ask that you reconsider Ms. Clifford's Second Cause of Action for

1 *Defamation against Mr. Cohen, and stipulate to the voluntary dismissal of*
 2 *same.*

3 *I have a trial beginning on April 3, 2018 in another matter and therefore*
 4 *request that we hold the meet and confer conference regarding Mr. Cohen's*
 5 *anti-SLAPP motion **this week**. As the prior meet and confer conference was*
 6 *held at my office, I'll be happy to travel to Newport Beach for this one.*

7 *Naturally, all of my client's claims are expressly reserved and none are waived.*

8
 9 (ECF No. 31-1, Ex. #H)

10 Consequently, as of March 27, 2018, the day after Plaintiff sued Mr. Cohen
 11 for defamation, Plaintiff knew or should have known the facts underlying his Motion
 12 to Amend, but Plaintiff chose not to file a Motion to Amend for over seven months.
 13 That is undue delay. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir.
 14 1990)(holding that it was unreasonable to delay filing an amended complaint eight
 15 months after obtaining the pertinent facts). During this time Plaintiff and her counsel
 16 have used this frivolous lawsuit as a platform to further their own notoriety at the
 17 expense of Mr. Cohen. Not only was Mr. Cohen required to remain silent in the face
 18 of their relentless attacks, which included numerous instances of slander and the
 19 unlawful release of Mr. Cohen's confidential bank records (ECF No. 60), Mr. Cohen
 20 has gone to considerable expense to defend himself against Plaintiff's allegations.
 21 Now, on the eve of this Court deciding Mr. Cohen's Anti-SLAPP Motion, Plaintiff
 22 seeks dismiss her defamation claim thru an amended complaint.

23 Plaintiff's delay amending the complaint to dismiss her defamation claim for
 24 the purpose of prolonging this litigation and forcing Mr. Cohen to incur unnecessary
 25 expenses demonstrates bad faith. The grant of leave to amend in this situation will
 26 cause substantial prejudice to Mr. Cohen. Instead of prevailing on his Anti-SLAPP
 27 Motion and having Plaintiff's SLAPP claim dismissed with prejudice, Mr. Cohen
 28 may have to defend against a similar lawsuit in another jurisdiction – something

1 California's Anti-SLAPP statute was specifically designed to prevent. Under these
2 circumstances it is appropriate for this Court to deny Plaintiff's Motion to Amend.

3 **C. Even If This Court Allows Plaintiff to Dismiss Her Defamation Claim,**
4 **It Should Exercise its Discretion to Award Mr. Cohen His Fees**
5 **Pursuant to Civil Code Section 425.16(c)**

6 It is well established that Plaintiff cannot avoid an award of attorneys' fees
7 and costs under CCP section 425.16(c) by dismissing her defamation claim.
8 "Plaintiff's amendment of the first amended complaint to remove the defamation
9 claim is tantamount to a voluntary dismissal of his defamation claim which was the
10 subject of a pending anti-SLAPP motion." *Fleming v. Coverstone*, 2009 U.S. Dist.
11 LEXIS 22083 *15 (N.D. Cal. March 18, 2009). "Where the plaintiff voluntarily
12 dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial
13 court has discretion to determine whether the defendant is the prevailing party for
14 purposes of attorney's fees under section 425.16(c). *Fleming* at *13, citing *Coltrain*
15 *v. Shewalter* (1998) 66 Cal. App. 4th 94, 107.

16 As the district court in *Gottesman v. Santana*, 263 F. Supp. 3d 1034, 1040
17 (N.D. Cal. 2017) aptly observed when it retained jurisdiction to award fees pursuant
18 to §425.16(c):

19 *The anti-SLAPP statute . . . anticipates circumstances in which parties dismiss*
20 *their cases while motions to strike are pending. In such circumstances, the trial*
21 *court is given the limited jurisdiction to rule on the merits of the motion in*
22 *order to decide if it should award attorney fees and costs to the defendants."*
23 *The reasoning for this retention of limited jurisdiction makes intuitive sense. As*
24 *the court in Coltrain v. Shewalter explained, a voluntary dismissal should not*
25 *automatically preclude an award of attorneys' fees to a defendant because*
26 *'[o]therwise, SLAPP plaintiffs could achieve most of their objective with little*
27 *risk—by filing a SLAPP suit, forcing the defendant to incur the effort and*
28 *expense of preparing a special motion to strike, then dismissing the action*

1 *without prejudice. The specter of the action being refiled (at least until the*
 2 *statute of limitations had run) would continue to have a significant chilling*
 3 *effect on the defendant's exercise of its First Amendment rights. At that point,*
 4 *the plaintiff would have accomplished all the wrongdoing that triggers the*
 5 *defendant's eligibility for attorney's fees, but the defendant would be cheated of*
 6 *redress.'*

7 *Thus, consistent with the courts of the Ninth Circuit and of this state, the Court*
 8 *will consider the merits of Attorney Defendants' anti-SLAPP motion, in spite of*
 9 *Plaintiff's voluntary dismissal, for the limited purpose of determining whether*
 10 *Attorney Defendants are 'prevailing defendants' under the statute.*

11 *See also Mireskandari v. Mail*, 2014 U.S. Dist. LEXIS 199028, **11-13 (C.D. Cal.
 12 Aug. 4, 2014), *aff'd in part, appeal dismissed in part sub nom. Mireskandari v.*
 13 *Associated Newspapers, Ltd.*, 665 F. App'x 570 (9th Cir. 2016) (finding same and
 14 collecting authority).

15 Federal courts applying California's anti-SLAPP statute have generally
 16 followed the *Coltrain* approach, which states that a plaintiff's voluntary dismissal
 17 raises a presumption that the defendant is the prevailing party that the plaintiff can
 18 rebut by explaining its reason for dismissal. *Gottesman* at 1042; *Coltrain*, 66 Cal.
 19 App. 4th at 107; *Mireskandari* at **15-16 (concluding same and collecting authority);
 20 *see also Associated Newspapers* at 572 (affirming court's grant of attorneys' fees
 21 under the *Coltrain* approach)

22 Like the plaintiff in *Gottesman*, Ms. Clifford has not opposed the merits of Mr.
 23 Cohen's Anti-SLAPP Motion nor explained in her Motion to Amend why she seeks to
 24 dismiss her defamation claim while Mr. Cohen's Anti-SLAPP motion is still pending.
 25 *Gottesman* at 1043. In fact, other than citing authority for the undisputed proposition
 26 that this Court has discretion to grant a motion to amend pursuant to FRCP 15(a),
 27 Plaintiff gives no explanation whatsoever as to why, after seven months, she now
 28 seeks to abandon her defamation claim. As the court in *Gottesman* held, "[w]ithout

more, the Court finds that Plaintiff has not rebutted the presumption that Attorney Defendants are the prevailing party for purposes of attorneys' fees and costs under the anti-SLAPP statute." *Gottesman* at 1043; *See also Fleming* at **14-15 (finding that a defendant was a prevailing party within the meaning of California's anti-SLAPP statute where the plaintiff "did not assert that he dismissed the defamation claim because Plaintiff has substantially achieved his goals through settlement, because Defendant was insolvent, or for other reasons unrelated to the probability of success on the merits.")

Even if Plaintiff's counsel attempts to offer some belated explanation in a reply brief, doing so would be futile. While Plaintiff's counsel has failed to give any motive for the dismissal, the only reasonable conclusion is that it is directly related to the probability of success on the merits. In a ten (10) day period preceding the filing of Plaintiff's Motion to Amend, Plaintiff's counsel was:

- defeated in connection with Mr. Trump's Anti-SLAPP Motion;
- hit with a personal judgment of \$4.85 million;
- evicted from his law office; and
- referred to the FBI by the Chairman of the Senate Judiciary Committee in connection with the false claims made concerning Justice Brett Kavanaugh.²

Plaintiff's counsel (who portrays himself *ad nauseum* as winner, has political aspirations, and is keenly aware of the media) seeks to avoid further losses and the imposition of fees against his client. Correctly perceiving that his chances of prevailing against Mr. Cohen's Anti-SLAPP motion as hopeless, Plaintiff's counsel has opted for the legal equivalent of running away – dismissing Plaintiff's defamation claim through a motion to amend. As the district courts in *Gottesman* and *Fleming* both concluded when confronted with this same issue, under these circumstances Mr. Cohen is the prevailing party for purposes of attorneys' fees and costs under

² Blakely Decl. Exs. ##1,2 & 4.

1 California's Anti-SLAPP statute.

2 This conclusion would be the same even if this Court were to rule on Mr.
3 Cohen's Anti-SLAPP Motion. Plaintiff did not oppose Mr. Cohen's Anti-SLAPP
4 motion on the merits, but instead only argued that New York law, rather than
5 California law, applies. Thus, Plaintiff conceded that: a) her claim arose from acts "in
6 the furtherance of Mr. Cohen's right of petition or free speech, and b) she cannot
7 prevail on her defamation claim. *Reyes v. Wells Fargo Bank, N.A.*, 2017 U.S. Dist.
8 LEXIS 198129 *8 (CD Cal. Aug. 7, 2017); Local Rule 7-12; *Ghazali v. Moran*, 46
9 Fed. 3d 52, 53 (9th Cir. 1995). As discussed in Mr. Cohen's Anti-SLAPP Motion
10 (ECF No. 31 pp. 15-17) and Reply Brief (ECF NO. 95), California law governs the
11 application of California's Anti-SLAPP statute.

12 However, this Court doesn't need to cross that bridge. As discussed above,
13 federal courts have generally adopted the *Coltrain* approach over the reasoning set
14 forth in *Liu v. Moore* (1999) 69 Cal. App. 4th 745. *See Mireskandari* at **12-14;
15 *Gottesman* at 18; *Fleming* at **14-15. Even if Plaintiff cobbles together some reason
16 for the dismissal of the defamation claim unrelated to the probability of success on the
17 merits, no amount of spin will change the fact that Mr. Cohen is the prevailing party.
18 Plaintiff brought one claim against Mr. Cohen, her Second Cause of Action for
19 defamation, which will have been dismissed. Civil Code §425.16(c); *Ketchum v.*
20 *Moses* (2001) 24 Cal. 4th 1122, 1131("any SLAPP defendant who brings a successful
21 motion to strike is entitled to mandatory attorney fees"); *Mireskandari* at **17-18.

22 Accordingly, if this Court decides to grant Plaintiff's Motion to Amend, Mr.
23 Cohen respectfully requests that Mr. Cohen be deemed the prevailing party for the
24 purpose of awarding fees pursuant to California's Anti-SLAPP statute.

25 **D. This Court Should Place Conditions on Any Amendment**

26 A district court, in its discretion, may impose attorneys' fees and costs as a
27 condition of granting leave to amend in order to compensate the opposing party for
28 expenses incurred because the original pleading was faulty. *See General Signal*

1 *Corp. v. MCI Telecommunications Corp.*, 66 F.3d 1500, 1514 (9th Cir. 1995)(“we
 2 find no abuse of discretion arising from the court's justifiable attempt to compensate
 3 GSX for MCI's backpedaling on its counterclaims.”); *Firchau v. Diamond Nat'l*
 4 *Corp.*, 345 F.2d 269, 275 (9th Cir. 1965); *Uecker v. A Very Nice Pool Co.* (In re
 5 Mortgage Fund '08 LLC), 2015 U.S. Dist. LEXIS 129548 **25-26 (C.D. Cal. Sept.
 6 2015); *Roth v. First in Awareness, LLC*, 2011 U.S. Dist. LEXIS 103053 **5-6 (N.D.
 7 Cal. Sept. 13, 2011)(original pleading meritless, defendant pointed this out to
 8 Plaintiff, but Plaintiff refused to amend the complaint to state valid claim against her
 9 in order avoid the need of a motion). If this Court allows Plaintiff to amend yet
 10 decides not to exercise its discretion to determine whether Mr. Cohen is the
 11 prevailing party for purposes of attorney's fees under section 425.16(c), it should
 12 make any amendment conditioned upon the payment of Mr. Cohen's fees and costs.
 13 Like *Roth*, Ms. Clifford's defamation claim against Mr. Cohen is meritless, Mr.
 14 Cohen's counsel pointed this out to Plaintiff's counsel on March 27, 2018, yet
 15 Plaintiff refused to amend at that time thus forcing Mr. Cohen to incur the expense of
 16 filing an Anti-SLAPP Motion.

17 **E. This Court Should Exercise its Inherent Powers and Sanction Plaintiff's**
 18 **Counsel Pursuant to FRCP Rule 11**

19 This Court has the inherent power to impose attorneys' fees for bad faith
 20 conduct in litigation. *Chambers v. NASCO, Inc.* 501 U.S. 32, 43 (1991); *Roadway*
 21 *Express, Inc. v. Piper*, 447 U.S. 752, 764-766 (1980). The court's inherent powers
 22 “are governed not by rule or statute but by the control necessarily vested in courts to
 23 manage their own affairs so as to achieve the orderly and expeditious disposition of
 24 cases.” *Chambers*, 501 U.S. at 43. Additionally, this Court has the power to impose
 25 sanctions Pursuant to Federal Rule of Civil Procedure, Rule 11 *sua sponte*. FRCP
 26 11(c)(3); *In re Itel Secur. Litig.*, 791 F. 2d 672, 675 (9th Cir. 1986). Plaintiff's
 27 defamation claim against Mr. Cohen was meritless from the start. Far from being a
 28 developing area of the law, any attorney with a basic understanding of First

Amendment jurisprudence would have recognized that Plaintiff's claim, which attacks Mr. Cohen's Constitutionally protected speech, was untenable. FRCP 11(b)(2). Nonetheless, even after having been warned, Plaintiff's counsel maintained this cause of action for the improper purpose of harassing Mr. Cohen. FRCP 11(b)(1). Plaintiff's attempt to dismiss her defamation claim thru a motion to amend is a tacit acknowledgment that this claim is frivolous. This Court should hold Plaintiff's counsel, Michael Avenatti, personally responsible for his actions and order that he and Plaintiff be jointly responsible for Mr. Cohen's fees in connection with the Anti-SLAPP motion.

IV. CONCLUSION

For the foregoing reasons, Mr. Cohen respectfully requests that the Court deny Plaintiff's Motion to Amend her complaint to dismiss her Second Cause of Action for defamation. Alternatively, that this Court deem Mr. Cohen the "prevailing party" for the purpose of awarding fees pursuant to California's Anti-SLAPP statute, and that Plaintiff and her counsel be held jointly responsible for the payment of same.

Dated: November 13, 2018

BLAKELY LAW GROUP

By: /s/ Brent H. Blakely

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